IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1096 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

POHLA SHOBHAN RATHVA

Versus

STATE OF GUJARAT

Appearance:

MR MA KALATHIL for Petitioner

MR KC SHAH, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

Date of decision: 09/09/98

ORAL JUDGEMENT (Per A.L. Dave, J.)

1. An incident occurred at about 10.00 A.M. on 14th

May, 1991 at Amsota village of erstwhile Chotaudepur taluka of Baroda district, wherein a young boy about 2 to 3 years old, named Dinesh alias Dinio, was done to death, allegedly by present appellant-Pohla Shobhan Rathva by giving Dharia blows.

2. The facts, in nutshell, are that, accused appellant-Pohla's father Shobhan and complainant Thathia are brothers. They were having some disputes about partition of land. Complainant-Thathia has four sons and four daughters, the eldest is Hirabhai alias Hiro and the youngest was Dinesh alias Dinio or Dinia. The house of the complainant is located in the outskirts, but is surrounded by 4-5 houses nearby. On the day of the incident, as per the prosecution case, Thathia had gone to call on his mother, who was sick. The rest of the family members were at home. Around 10.00 A.M. accused-Pohla came there. He was having a Dharia with him. He demanded tobacco from Hirabhai, the eldest son of complainant-Thathia. He started smoking a beedi. Then Hirabhai told him to go to his place. Suddenly, accused Pohla pounced on Hirabhai. Hirabhai, therefore, started running and escaped from him. He ran for quite a distance, jumped a hedge and halted. Pohla, therefore, returned to the house of the complainant-Thathia and assaulted Dinesh alias Dinia, who was playing there. He gave the deceased Dharia blows on head and shoulder and other parts of the body which, ultimately, resulted into death of Dinesh. Then accused went away. Mother of the deceased and wife of complainant-Dhankiben, therefore, immediately rushed to her husband weeping. She told the complainant the whole story. The complainant, therefore, came to his home, saw Dinesh lying dead over there and he, therefore, went to Kawant Police Station and lodged the information. The police recorded the information and registered the crime at C.R.-I No.109/91. The police started investigation, came to the spot, prepared Panchnamas, recorded statements and, ultimately, having found sufficient evidence against the accused, filed charge sheet. The matter came to be tried by learned Additional Sessions Judge, Baroda, Camping at Chotaudepur. The accused pleaded not guilty to the charge against him and expressed his desire to face the trial. Evidence was recorded and, after considering the evidence on record, the learned Additional Sessions Judge came to the conclusion that the prosecution was able to prove the guilt of the accused and convicted the accused for an offence of murder and sentenced him for life imprisonment and imposed a fine of Rs.500/-, and directed him to undergo further rigorous imprisonment for two months in case of default in payment of fine.

3. Being aggrieved by the said judgment and order dated 20th November, 1991 in Sessions Case No.46 of 1991, the original accused has preferred this appeal.

4. We have heard learned advocate Mr. Kalathil for the appellant and learned Additional Public Prosecutor Mr. K.C. Shah for the respondent-State.

5. Mr. Kalathil argued that although the prosecution case is that there are three eye-witnesses to the incident, who were examined by the prosecution, they are all foisted witnesses. There was no motive or no enmity alleged against the accused vis-a-vis the child, who met with the unfortunate fate. According to him, the whole genesis of the prosecution case is under a cloud of doubt. He submitted that, the prosecution case that complainant-Thathia was not at the place of the incident when the incident occurred, itself is doubtful. He has drawn our attention to certain portion of the depositions, particularly that of independent Panch witness, to show that Thathia was very much present at the place of the incident. He submitted further that Thathia himself has admitted in his cross-examination that he has implicated the accused only because there was a dispute going on with him. This fact is corroborated by deposition of independent Panch witness-Ramsing, who says that when he reached the place of the incident, he was told by Thathia, his son-Hira, daughter-Bushi and wife Dhanki that somebody has murdered Dinia and, thereafter, all of them collectively gave name of Pohla, the accused, and, therefore, the whole story of the prosecution becomes doubtful and possibility of false implication of accused cannot be ruled out.

5.1 Assailing deposition of Hira, Mr. Kalathil submitted that, if his cross-examination is perused, it indicates that he could not have witnessed the incident because of distance and obstruction. Likewise, it was urged that the eye-witnesses have emphatically asserted that only two blows were given at the time of the incident by the accused whereas the medical evidence indicates that, for causing the injuries, at least three blows ought to have been given by the assailant. He submitted that that witnesses have made substantial and deliberate improvement in their depositions to suit the requirement of the prosecution case. Mr. Kalathil then argued that, if the investigation, as such is considered, the investigation itself does not seem to be independent, unbiased and reliable. According to the prosecution, the accused surrendered himself to the police in the evening

on the date of the incident. On the other hand, the Panch witness says that he was apprehended by complainant-Thathia and his family members and was made over to the police immediately at the place of the incident. The question is which version is right? Mr. Kalathil then submitted that the conduct of the so called eye-witnesses is very unnatural. The mother, the sister, the sister-in-law and the brother of the deceased young child have claimed to be eye-witnesses have proved tto be silent spectators to the brutal assassination of the deceased. No mother, no brother or no sister would remain unperturbed, undisturbed and dispassionate to such an incident. Nobody has made any attempt to rescue the boy or even to raise alarm and, therefore, their depositions also become doubtful. Lastly, Mr. Kalathil submitted that, according to Thathia, he went to the Police Station and told the police that his son is killed. The police thereupon obtained his thumb impression on a paper. That F.I.R. is not coming forth. The F.I.R. that is coming forth is detailed one giving full details of the incident and implicating the accused. The present F.I.R., therefore, does not match with the description of the F.I.R. that is given by the complainant. The prosecution case, under the circumstances, cannot be accepted at face value. Mr. Kalathil, therefore, urged that the appeal may be allowed and the judgment and order recording conviction of the accused-appellant may be set aside and the accused-appellant may be acquitted of the offences with which he is charged.

6. Mr. K.C. Shah, learned Additional Public Prosecutor, appearing for the respondent-State submitted that the witnesses are illiterate and they may have made a few mistakes here and there. The witnesses are not scheming witnesses who can be said to have improvised their version only to fit the prosecution case. The question whether the injury was on left side or right side or the left hand or the right should not matter much in such cases. The error in description has to be considered in light of the fact that witnesses are rustic and illiterate villagers. As regards medical evidence, Mr. Shah submitted that although the doctor has said that a particular injury is not recorded by the doctor in postmortem notes, if the postmortem notes are perused, the injury is found to have been recorded not in column No.17 but in column No.16. Likewise, deposition of mother of the deceased-Bai Dhanki stands corroborated by the fact that 50 cc. of liquid was found from the stomach of the deceased, which corroborates her say that the deceased had taken Rabadi in the morning. There is

no reason to disbelieve deposition of Bai Dhanki and Bushi. As regards deposition of Ramsing, Mr. Shah submitted that he is basically a Panch witness and, therefore, the rest of his deposition may be neglected. As regards deposition of Hira, he submitted that "Kotaradi" which is said to have obstructed the vision is only 2 feet deep and, therefore, it could not have obstructed his vision. Mr. Shah, therefore, urged that the decision of the learned Trial Judge is just, proper and legal and does not call for any interference by this Court.

7. We have closely scrutinized the evidence on record.

8. There seems to be some dispute going between the complainant and the father of the accused regarding the property, but, certainly, no person can have any animus against a young child of 2-3 years old. It is equally true that a young child of 2-3 years old has been brutally murdered, as can be seen from the medical evidence. The injury was such that half of the head was chopped off besides other injuries and, therefore, a close scrutiny of evidence is essential to rule out the possibility of either the culprit getting away with the crime or the possibility of a false person being punished out of sentiments or emotions considering the way in which a young child is done to death.

9. According to the prosecution case, complainant-Thathia, Ex.7, does not claim to be an eye-witness to the incident. He was away with his mother attending to her who was sick. He was informed by his wife about the incident and he, therefore, went to the place, saw the dead body of Dinia and then lodged the complaint with Kawant Police Station. The glaring feature of his deposition is that, during the cross-examination, he admits that there is animosity between him and father of the accused. He admits that the accused had lodged a case against him which is pending at Chotaudepur and then he admits that he has implicated accused-Pohla because there was a dispute going on. This aspect would assume greater weight or strength if deposition of witness-Ramsing, Ex.15, is simultaneously considered. He is a Panch witness and he claims to have reached the place of incident soon after the incident had occurred. He says that when he reached the place of incident, he saw Thathia, Hira, Bushi, Dhanki, etc. weeping. They told him that somebody had murdered Dinia and, thereafter, they collectively gave name of accused-Pohla. This indicates that the genesis

of the whole incident is doubtful. Involvement of the accused also becomes doubtful as his name does not emerge naturally but seems to have been given after deliberation and because of existing animosity. This is a very serious lacuna in the prosecution case which requires consideration.

10. The second aspect is that although Thathia claims not to be present at the place of the incident, if deposition of Ramsing, Ex.15, is considered, he states that when he reached the place of incident, Thathia was present. He states that Thathia, Hira, Bushi, and Dhanki were all weeping and then he again states that Thathia, Hira, Shana, etc. apprehended the accused and hand him over to the police. This also raises a doubt as to whether complainant was really not present at the place of incident and if that be so, whether he is really telling truth about the incident and its origin? Does this not indicate that the complainant has something to hide? And, therefore, would it be safe to rely on his evidence or the prosecution case set into motion by him? The deposition of witness Hirabhai, Ex.9, indicates that he claims to be an eye-witness. But it transpires therefrom that he ran away from the place as, according to him, accused-appellant had pounced on him with a Dharia. During cross-examination, he states that he started running. There is a "Kotaradi" near his house which is deep. He went beyond the Kotaradi and because he had run, he was exhausted. He took some rest staying there and, thereafter, came home when he found Dinia lying dead. The witness also admits to have jumped a hedge. After making this admission in the cross-examination, he immediately volunteers that with all these, he had seen the incident. There is a discrepancy as to which of the hand the injury was caused to the deceased and there is a contradiction regarding left and right hand although he admits and demonstrates to be knowing the left and right side correctly. If this witness was so much scared that he had to run away, it is a matter of doubt whether he could have witnessed the incident particularly from a long distance. It is true that the Kotaradi, which is admitted by him to be deep, is only 2 feet deep, as can be seen from deposition of Punjabhai, Ex.22, who states categorically that depth of the Kotaradi is 2 feet only. Considering that the witness committing mistake about the left and right side of the hand of the deceased and considering that he was scared and started running, it becomes doubtful as to whether this witness could have really witnessed the incident, as he claims. Besides this, the deposition of this witness suffers from the infirmity of making

improvements and exaggerations, which are proved through deposition of the Investigating Officer and, therefore, the question is as to how much reliance can be placed on deposition of this witness. It is also worthwhile considering that the story advanced by this witness reflects a situation which does not support the original prosecution version. He says that he was at his house when accused came with a Dharia. The accused demanded tobacco from him. Thereafter, accused lighted a beedi and then this witness-Hirabhai told the accused to go to his place and he would go the other way, and then abruptly the accused pounced on him. This version, if taken at face value, indicates that the accused and this witness cannot be said to be on inimical terms. They had such terms as would permit the accused to demand tobacco from him and would permit the accused to offer a beedi to him in turn. So the theory of them being on inimical terms, if not negatived, is rendered doubtful. Same way, till this transaction of tobacco and beedi took place, there was nothing to indicate any intention or anger on part of the accused. This transaction is not such as to provocate a person to assail and, therefore, there appears nothing laudable or palatable behind the story of this witness that all of a sudden, accused pounced on him. There was no provocation, no encounter and no altercation between the accused and the witness and, therefore also, this version goes to the root or the genesis of the prosecution case. There is a possibility that the relations were not so strained. There does not seem to be any premeditation by the accused and it also rules out provocation. It is nobody's case that there was any heated exchange of words. This being so, the deposition of this witness-Hirabhai adversely affects the prosecution case rather than helping the prosecution case. As a consequence, the motive part of the prosecution story also gets affected.

11. Witness-Dhankiben, wife of complainant-Thathia and mother of the deceased, claims to be an eye-witness. Her conduct of not at all reacting to the assault by the accused upon a young child of 2-3 years old needs serious consideration. True it is that different individuals react in different manner to a given set of circumstances or event. But this conduct of this witness has to be considered along with other aspects affecting the veracity of the deposition of this witness. It is evident that the description of the clothing of the accused at the relevant time is given. She says that the accused was wearing a black upper garment whereas when the accused was apprehended on the same day in the evening, he was found to be wearing a green coloured

upper garment. She is also falsified by the fact that, according to her, deceased-Dinia had taken Rabadi, which is a liquid preparation made out of corn flour, for break-fast. Against this deposition of this witness and say of witness-Hirabhai that Rabadi was prepared for break fast and all family members had taken the same in the morning, and the young children had taken "Rotla" along with Rabadi, there is deposition of Doctor Mishra, at Ex.11 and Postmortem Notes, at Ex.12, to indicate that there was no food particles in the stomach of the deceased. The stomach contained 50 cc. of natural fluid. He also states that the deceased may not have taken any food within an hour and a half prior to his death. The doctor says that, considering the condition of the intestines, he was of the opinion that the deceased may have taken food 2-3 hours prior to his death. This negatived the say of Dhankiben that Dinia had taken only Rabadi and that too, in the morning. The cumulative effect of all these facts adversely affects the deposition of this witness.

12. Likewise, the deposition of Bushiben, at Ex.14, also suffers from same infirmities as that of Dhankiben. She adds and improves her story to the effect that the accused indiscriminately assaulted the deceased. But during cross-examination, she again asserts that only two Dharia blows were given. Her conduct is also very unnatural. She claims to have identified the Dharia, but admits that there was no special identification mark on the Dharia and such Dharias are freely available in market.

13. Witness-Ramsing Bhaya, Ex.15, is the Panch witness. He is Panch to the Panchnama of place of occurrence as well as recovery of Dharia. He claims to have reached the place of incident soon after the incident occurred and some of his admissions during the cross-examination raises a situation which renders the whole prosecution case doubtful. As stated earlier, he states that, when he reached there, complainant-Thathia, witness-Hiro, Bushi and Dhanki were present and they said that somebody has murdered Dinia. They were all weeping. But then, ultimately, the all collectively gave the name of Pohla. He also states that the accused was apprehended by Thathia, Hira and Shana and made over to police. A close scrutiny of paragraph 2 of his deposition makes it clear that the alleged recovery of Dharia cannot be accepted. In fact, if this version is accepted, that would adversely affect the nature and manner of investigation by the investigating agency. If the investigating agency is found to have investigated in

a manner which cannot be considered as independent or unbiased, the whole prosecution case has to be thrown off the board. This witness says that the police went to the house of the accused and brought the Dharia. The witness saw that Dharia for the first time when it was brought at the place of incident. The police had drawn the Panchnama and taken his thumb impression. That Panchnama is at Ex.18 and, if that is perused, it indicates that it is supposed to have been drawn at the house of the accused and the accused has produced the Dharia. So, if a Panchnama can be concocted, it has to be left to the imagination what else could be concocted. Another aspect that needs a serious consideration is that, none of the eye-witnesses speaks of use of any hard and blunt substance by the accused. They all alleged that the accused had given two Dharia blows to the deceased. Apart from the fact that more number of injuries are found on person of the deceased, the nature of injury that is found on person of the deceased is a contused lacerated wound which can be caused by hard and blunt substance. Nobody comes with a case that the blunt side of the Dharia was used by the accused while inflicting blow. The impression that is tried to be created from the depositions of these witnesses is that sharp edge of the Dharia was used by the accused for inflicting injury and, therefore, this non-explanation on part of the prosecution adds to the weakness of the prosecution case.

14. The outcome of the above discussion of evidence is that the genesis of the incident, as brought out by the prosecution, is found to be doubtful and away from the truth. The depositions of the so called eye-witnesses remain under a cloud of doubt which is created by their own admission in the cross-examination and other surrounding circumstances. The ocular evidence gets no corroboration from the medical evidence. The investigation is not beyond the core of suspicion and, unfortunately, these aspects seem to have escaped the attention of the trial Court. We, therefore, feel that there is substance in the appeal. The prosecution cannot be said to have proved the case against the accused-appellant to the hilt. It suffers from numerous suspicious circumstances and the benefit, therefore, must go to the accused.

14. In the result, this appeal succeeds and is hereby allowed. The judgment and order of conviction recorded by the learned Additional sessions Judge, Vadodara, Camp at Chotaudepur, in Sessions Case No.46 of 1991 on 20th November, 1991 is hereby set aside and the appellant-accused is acquitted of the offences with which

he is charged. The appellant-accused is ordered to be set at liberty forthwith, if not required in any other case. The amount of fine, if paid by the appellant, be refunded to him.

[J.N. BHATT, J.]

[A. L. DAVE, J.]

gt